No. 22650

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22650

A & A SIGN COMPANY, INC., Appellant,

v.

REX E. MAUGHAN, Trustee of MAYER CENTRAL BUILDING CORPORATION, a Debtor, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

APPELLANT'S REPLY BRIEF

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RESPONSE TO APPELLEE'S STATEMENT OF FACTS

Appellee's footnote No. 5 on page 3 of his Brief is inaccurate in that it is incomplete by virtue of the fact that the Trustee, subsequent to the date the stipulation was signed, withdrew his objection to the Appellant's claim and approved it, and no other party filed or urged any objections to the withdrawal.

Appellant would also take issue with Appellee's footnote No. 8 on page 5 of his Brief. The implication is that the Court had always viewed the debtor's property as being three separate parcels. In fact, the Ann Clark Property did not acquire any such separate status until October of 1967, when the hearings were held on the Trustee's motion to correct the stipulation.

RESPONSE TO APPELLEE'S ARGUMENT

Appellant would first take up the Appellee's contention (pages 6-10 of Appellee's Brief) that since there was no decree by the Court declaring the Ann Clark Property to have been taken by the Mayers, doing business as the Mayer Development Co., a partnership, in trust for the debtor corporation, Appellant cannot have a lien because the debtor corporation had no interest in the Ann Clark Property prior to its turnover on April 2, 1966.

Perhaps Appellant is at fault for not making this point clear in its Opening Brief, or perhaps Appellee has either failed to see or chosen to disregard the thrust of our allegation of error. It is precisely the failure of the District Court to decree such a constructive trust in its Findings of Fact and Conclusions of Law on October 20 and October 24, 1967, that we complain about. A review of the record indicates that on February 18, 1966, the Trustee, having learned that the so-called Ann Clark Property was still in the name of the Mayers, doing business as the Mayer Development Co., a partnership, filed a petition to require the Mayers to turn over the buyer's interest in that property (R. 24-31) to the debtor corporation.

The matter was referred to Vincent D. Maggiore as Referee and Special Master. On March 21, 1968, the Referee and Special Master found, *inter alia,* that the debtor corporation has both the legal and equitable right and title to the buyer's interest in the Ann Clark Property. He also prepared an order that would require Lawrence and Eric Mayer, doing business as Mayer Development Co., a partnership, to assign and deed over all their interest in that property to the debtor corporation. (R. 36-37, Appellant's Exhibit No. 4).

Before the Court acted on the Referee's proposals, the Mayers, doing business as Mayer Development Co., a partnership, conveyed by vendee's deed their interest in the Ann Clark Property to the debtor corporation. By their very action, the Mayers, doing business as Mayer Development Co., a partnership, acknowledged they were holding the property as trustees for the debtor corporation.

On page 9 of his Brief, the Appellee states that, "The Master's report did not establish a constructive trust" and further on page 9, "The Master's report is merely advisory and must be confirmed by the District Court to be effective."

Appellant agrees that the Referee did not specifically

use the words "constructive trust," but there can be no doubt that this was the basis of his order, and the Mayers', doing business as the partnership, immediate compliance points up this position.

Further, the very act of the Mayers, doing business as the partnership, in complying with the proposed order made a formal decree from the Court unnecessary. See BOGERT, *Trusts and Trustees,* 2d ed., Ch. 24, § 471.

It must be remembered that the Trustee began these proceedings when he filed the petition for the turnover order; that the Trustee accepted the deed in reliance on the Referee and Special Master's report and that the District Court, on May 9, 1966, approved the Trustee's acquisition of this vendee's interest (R. 284). But now the Trustee as Appellee in this matter urges that the debtor corporation had no interest in the property until April 2, 1966, when he accepted the vendee's deed from the Mayers, doing business as the partnership.

There is nothing in the record before this Court or any other Court that would indicate that anything occurred which suddenly matured a right in the Trustee to go after that property on behalf of the debtor corporation. To the contrary, as indicated on page 6 of our Opening Brief, the

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There is nothing in the record before this Court or any other Court that would indicate that anything occurred which suddenly matured a right in the Trustee to go after that property on behalf of the debtor corporation. To the contrary, as indicated on page 6 of our Opening Brief, the

Trustee learned that the Ann Clark Property had never been deeded over to the debtor corporation, and he realized that since the debtor corporation had made all the payments on the property, the property really did and always had belonged to the corporation.

The Trustee having initiated these proceedings to get the property into the debtor corporation, it would seem that he should be estopped from now claiming the debtor corporation had no interest in the property before April 2, 1966, which would be directly contrary to the Trustee's position as set forth in his petition.

To urge, as Appellee does on page 9 of his Brief, that this turnover of property was merely an exercise of the inherent equitable powers of the Bankruptcy Court and nothing more, indicates the extent to which the Appellee is willing to close his eyes to the reality of the situation in order to support his position.

APPELLANT'S RESPONSE TO APPELLEE'S ARGUMENT THAT THE DEBTOR CORPORATION DID NOT HAVE AN INTEREST IN THE ANN CLARK PROPERTY WHICH WAS SUBJECT TO APPELLANT'S LIEN

The thrust of Appellee's argument on pages 10-14, simply stated, is that a constructive trust is a procedural device and does not create any substantial rights. Taken in the

abstract, this is perhaps a correct statement; but here again the Appellee, with a narrowness of view that pervades his entire Brief, fails to follow the logic of the situation.

This creature of equity, the constructive trust, is the foundation from which the substantive relief comes. Without the relief required by equity, the substantive rights cannot come into existence and, by the same token, if equity could not require that the necessary substantive steps be taken, then equity itself would be a sterile and barren device.

Appellee cites several cases in support of his proposition that equity is a procedural device and then denominates these cases as "controlling authorities" (P. 12 of Appellee's Brief) for the proposition that Appellant's lien did not relate back to the date of acquisition of the Ann Clark Property by the Mayers, doing business as the partnership, having first said (P. 11):

> "Even if a constructive trust was established by the District Court, the Debtor corporation did not acquire an interest in the Ann Clark Property until the vendee's deed was executed on April 2, 1966."

These statements fly in the face of the Referee and Special Master's report (R. 32, Appellant's Exhibit No. 4)

to the effect that "the debtor corporation has both the legal and equitable right and title to the buyer's interest in said agreement" (R. 36) and to the following legal principle as set forth by BOGERT, the leading textbook on the subject of trusts:

> "The results of the decisions seem to show, however, *that when the wrongful holding of the property interest begins the wronged party has a cause of action to obtain a constructive trust* which is usually alternative to another remedy at law or equity, that the constructive trust is created by court decree, establishing the trust, but that when created, *the court regulates the rights of the parties as if the trust had been in existence from the date of the wrongful acquisition. The law-created trust relates back to the time of the wrong and makes the rights of the original parties and their successors in interest the same as would have been the rights of Cestui and Trustee of an express trust and their successors."* *Trusts & Trustees*, 2d ed., Ch. 24, § 472.

In *MacRae v. MacRae*, 37 Ariz. 307, 294 Pac. 280, is this definition of a constructive trust:

> "A constructive trust is one which does not arise by agreement or from the intention of the parties, but by operation of law, and fraud, actual or constructive, is an essential element thereto."

And in *Eckert v. Miller*, 57 Ariz. 92, 111 P.2d 60, the Arizona Supreme Court cited with approval the following language from POMEROY on *Equity Jurisprudence*:

> "In general, whenever the legal title to property, real or personal, has been obtained

> through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein."

And in *Markel v. Phoenix Title & Trust Co.*, 100 Ariz. 53, 410 P.2d 662:

> "A constructive trust expresses the idea that a defendant is under an equitable duty to give the complainant the benefit of property held. A wrongful holding begs relief whether the type of injustice is old or new regardless of whether actual fraud exists."

Based on all of the foregoing, Appellant again urges that under the Referee and Special Master's report (R. 32, Appellant's Exhibit No. 4), the Mayers', doing business as the partnership, prompt compliance with that report, the acceptance of the vendee's deed by the Trustee, and the approval thereof by the District Court, the Trustee's interest in the Ann Clark property dates back to the original contract of sale between Ann Clark and the Mayers, doing business as the partnership (R. 24-31, Appellant's Exhibit No. 3).

APPELLANT'S RESPONSE TO APPELLEE'S ARGUMENT THAT A VENDEE'S INTEREST IN REAL PROPERTY IS NOT SUBJECT TO A MATERIALMEN'S LIEN IN ARIZONA

While blatantly ignoring the applicable Arizona law, which is controlling, the Appellee, on pages 14-16, takes a tour through the Fifth Circuit, Texas and Indiana to find cases that support his theory. Rather than repeat the quotations from the Arizona cases which support Appellant's theory that a materialmen's lien will attach to an estate in land that is less than fee simple in the State of Arizona, Appellant will merely list the controlling cases again and refer this Court to the quotes and arguments on pages 13-17 of Appellant's Opening Brief, all of which hold that such an interest is subject to the lien:

Demund Lumber Co. v. Franks,
40 Ariz. 461, 14 P.2d 256;

Ernst v. Deister, 42 Ariz. 379, 26 P.2d 648;

City of Phoenix v. State, ex rel., Harless,
60 Ariz. 369, 137 P.2d 783;

Pinkerton v. Pritchard,
71 Ariz. 117, 223 P.2d 933;

Mills v. Union Title Co.,
101 Ariz. 297, 419 P.2d 81.

APPELLANT'S RESPONSE TO APPELLEE'S ARGUMENT THAT APPELLANT FAILED TO PERFECT ITS LIEN AND PROVE THAT IT HAD PROVIDED LABOR AND MATERIAL

The Appellant respectfully calls the Court's attention to the following sequence of events:

In the fall of 1967, the Appellee filed a motion to correct the Stipulation of February 20, 1967. The correction was to take the form of deleting the Ann Clark Property therefrom. This was the only point urged by the Appellee. No other aspect of the Stipulation was questioned. (R. 256-263).

On October 9, 1967, arguments on the Appellee's motion were heard, and the District Court took the motion under advisement.

Immediately thereafter, Appellant moved to have the testimony taken on October 9, 1967, incorporated into the Rule 197 hearings which had been previously held.

At the hearing held on October 18, 1967, the Court took Appellant's motion to incorporate the testimony of October 9 into the 197 hearings under advisement pointing out that Appellant, in relying on the Stipulation of February 20, 1967, had not deemed it necessary to participate in the 197 hearings and that the motion to correct the

Stipulation was not brought until after the 197 hearings had been conducted. (Transcript of Proceedings, Appellant's Exhibit No. 6, P. 44, lines 14-25).1/

Subsequently on October 20, 1967, further hearings were held; and at the conclusion of the hearings, the *District Court without actually ruling, indicated what his ruling would be.* (Transcript of Proceedings, Appellant's Exhibit No. 6, pages 79-81). (Emphasis supplied).

Thereafter, the District Court entered its Findings of Fact, Conclusions of Law and Order determining objections to the allowance of creditor's claims. (Appellant's Exhibits 7, 8 and 9).

While the District Court did, indirectly, rule on the Appellee's motion to correct the Stipulation of February 20, 1967 (see Finding of Fact No. 3 and Conclusions of Law

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1/ Q (By the Court) As I gather it, you wanted to incorporate these hearings that were held on October 9, 1967, and make them part of the 197 hearings, because I believe it was your contention that when you entered into the stipulation you believed it was unnecessary, from that, to present any further testimony with respect to whether or not work had been done by the A & A Sign Company on that northeast property, Ann Clark property, and having found out that there was an objection to that stipulation on the grounds of mutual mistake, you felt that this testimony should be incorporated and made a part of the 197 hearings?

A (Mr. Wolfe) That is right.

No. 15 and 16 in Appellant's Exhibit 7), the District Court did not at that time nor at any time subsequent thereto rule on Appellant's motion to have the hearings of October 9, 18 and 20 (Appellant's Exhibit No. 6) included as part of the Rule 197 hearings.

In WIGMORE ON EVIDENCE, 2d ed., § 19, p. 191, it was said:

> "A ruling reserved and never rendered upon an offer objected to and left pending, is, therefore, equivalent to a ruling of exclusion. [Citing cases]."

This being the case, then all of the testimony contained in the Transcript of Proceedings, Appellant's Exhibit No. 6, that pertains to anything but the arguments of the Appellee's motion to correct the Stipulation of February 20, 1967, is irrelevant and not material to this appeal.

It is, therefore, Appellant's position that since no other portion of the Stipulation of February 20, 1967, was attacked by the Appellee, the only issue properly before this Court is whether or not the lien stipulated to by the parties to the appeal attaches to the Ann Clark Property. It is interesting to note that at the hearing held on October 9, 1967, Mr. Duecy, the attorney for the Appellee, had no doubt as to the validity of Appellant's lien

and did not even believe that to be in dispute. He was only concerned with correcting the Stipulation so as to remove the Ann Clark Property from its effect based upon his unilateral mistake. This is made quite clear on pages 35 through 41 of Appellant's Exhibit No. 6.[2/]

2/ (Mr. Duecy) No, I am merely saying--please, Mr. Wolfe, I am not arguing the merits of the case. You brought this up, and I am very sympathetic towards your cause. All I am saying is we made a mistake, and I want the mistake corrected. You will probably still get the money, but I still want the mistake corrected. That sizes it up. (p. 35 line 24 through p. 36 line 4).

(Mr. Duecy) Because he has filed a lien, and I don't believe that anybody has challenged his lien on the North property. (p. 37 lines 11-13).

(Mr. Duecy) We are not questioning the lien--

(The Court) Mr. Duecy, just a moment. The point is that there is a record that has been made, in any case. The record I suppose might be determined that you have a lien anyway, when we get to that point of the final findings of fact and conclusions of law, irrespective of this stipulation and order.

That's all I am saying. Let's see what happens with respect to that, and if that settles the matter, that will resolve it.

If not, then I will have to make the decision as to whether or not the stipulation and order are binding, or not.

(Mr. Duecy) Your Honor, I think the problem Mr. Wolfe is faced with does not concern itself with this stipulation.

It concerns itself primarily with whether the trustee owned the property at the time that the lien was filed.

In other words, whether this turnover order was nunc pro tunc, and if we had, as you claimed, Sidney, the right, equitable, real, and legal title to that property, then I don't think that there is any question but what his lien attached. (p. 39 lines 3-24)

2/ (Continued)

(Mr. Duecy) If we owned the property, then I think his lien is good without a stipulation.

If we didn't own the property, we can't stipulate ourselves into ownership, Your Honor.

(Mr. Wolfe) All I can respond to that is that there is an order of the Court that says that the debtor corporation at all times owned the equitable and legal title, and compelling these people to convey it.

(The Court) Is this the Referee's order?

(Mr. Wolfe) Yes.

(The Court) Or mine?

(Mr. Wolfe) I don't know what your order said. I am sure it was probably fairly similar to that.

(Mr. Duecy) The referee and special master, his order.

There is no objection (p. 40 line 24 through p. 41 line 14).

Appellant urges that the basic issue to be determined is whether or not the lien that Appellant and Appellee stipulated to on February 20, 1967, attaches to the Ann Clark Property.

APPELLANT'S RESPONSE TO APPELLEE'S ARGUMENT THAT THE DISTRICT COURT PROPERLY RELIEVED THE APPELLEE OF THE EFFECTS OF THE STIPULATION AS TO THE ANN CLARK PROPERTY

It is most interesting to note that nowhere in Appellee's Brief does he attempt to refute our argument that in situations involving unilateral mistake, the general rule is that relief will be denied to the mistaken party unless the other party can be put back in status quo. CORBIN ON CONTRACTS, Vol. 3, Ch. 28, § 606.

The fact that this is, at best, a situation of unilateral mistake is shown on page 24, lines 6-16 (Appellant's Exhibit No. 6) wherein counsel for Appellant made the following statement to the Court:

> "Mr. Wolfe: No, I'm not saying that, Your Honor. I am saying that I knew that there had been a turnover order made in this case. I am talking about me, personally. I know personally that there had been a turnover order entered as to the Ann Clark Property.
>
> "I also knew from my experience in this case that the Prudential Mortgage, and the Fifty Associates Mortgage did not cover it.

> "I also knew that my client had done work on this property, and that therefore he was probably the only one that had a lien as to it."

There was no inadvertence or mistake on Appellant's part. Appellee, in attempting to support his position that the District Court was correct in finding inadvertence and mistake on his part, cites *Miller v. Schafer*, 102 Ariz. 457, 432 P.2d 585, as a case "where the court disapproved penalizing an attorney by refusing to grant relief from a stipulation entered into through inadvertence." (p. 33 of Appellee's Brief). Unfortunately, Appellee failed or neglected to quote all of what was said by the Arizona Supreme Court. The actual quote is:

> "We are not inclined to penalize an attorney who makes an inadvertent stipulation which he discovers and tries to correct *before any damage has been done*." *Miller v. Schafer, supra* (emphasis supplied).

In the case at bar, "the damage" in the form of the release of lien as to the so-called South Property, was effected long before the Appellee attempted to correct the stipulation. (See Appellant's Exhibit No. 2). The fact is that Appellant had substantially changed its position in reliance on the stipulation and cannot now be returned to the status quo of February, 1967.

Appellant would reaffirm his position that the Appellee failed to meet the burden of proof that was his. "It is essential in order to obtain a decree rescinding or reforming a written conveyance, contract, assignment or discharge for mistake, that the facts necessary for the allowance of the remedy *shall be proved by clear and convincing evidence and not by a mere preponderance.*" (emphasis supplied). RESTATEMENT, CONTRACTS, § 511. Appellant urges that on the record Appellee failed to carry this burden of proof.

However, even assuming, arguendo, that they had carried this burden of proof, they are still estopped by virtue of the fact that Appellant had changed its position in reliance on the stipulation and cannot be restored to its original position.

The last point Appellee makes is that Appellant waived its right to rely on the stipulation by electing to prove its lien at the hearings held on October 18 and 20, 1967. In support of this contention, Appellee cites *Gorman v. Wilson*, 98 P.2d 600 (Okla. 1940), and *Hamco Oil & Drilling Co. v. Ervin*, 354 P.2d 442 (Okla. 1960). Appellee states on p. 37 of his Brief that:

> "Subsequently the Appellant attempted to prove the validity of its lien against the Ann Clark Property through the testimony of Mr. Magruder, its representative. The Appellant's *conduct* was inconsistent with the stipulation and accordingly it waived any right to rely on the stipulation." (emphasis supplied by Appellant).

Unfortunately this is not the rule laid down in these cases. The cases cited by Appellee do stand for the proposition that where a party relying on a stipulation introduces evidence *inconsistent* with that stipulation, then he has, to that extent, waived the stipulation. This is a far cry from Appellee's theory of the cases. The fact is that the entire transcript of the hearings of October 9, 18 and 20, 1967 (Appellant's Exhibit No. 6), is replete with the testimony of Mr. Magruder in support of the validity of the stipulation and the lien, and his testimony was not in any way inconsistent with the stipulation.

CONCLUSION

The District Court erred in finding that the Ann Clark Property and the proceeds of its sale are free from the Appellant's lien.

Respectfully submitted,

/s/ Sidney B. Wolfe

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Sidney B. Wolfe

Sidney B. Wolfe

AFFIDAVIT OF SERVICE BY MAIL

SIDNEY B. WOLFE, being duly sworn, says that he deposited three (3) copies of the foregoing Appellant's Reply Brief in final printed form in the United States Post Office in the City of Phoenix, State of Arizona, enclosed in an envelope duly addressed to Mr. Charles M. Duecy, Suite 1, 101 East Fourth Street, Scottsdale, Arizona 85252, with postage fully prepaid; he further states that he deposited twenty (20) copies in the United States Post Office in the City of Phoenix, State of Arizona, duly addressed to the Office of the Clerk, U. S. Court of Appeals for the Ninth Circuit, San Francisco, California 94101.

Both mailings were made on the 29th day of July, 1968.

/s/ Sidney B. Wolfe

Sidney B. Wolfe

Subscribed and sworn to before me
this 29th day of July, 1968.

/s/ Catherine F. Howard

Notary Public

My commission expires
September 29, 1971. [SEAL]